

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 42-97011 IFTA
INTERNATIONAL FUEL TAX AGREEMENT
FOR THE PERIOD
DECEMBER 4, 1995-DECEMBER 31, 1996

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ISSUES

I. **Tax Administration—Bankruptcy—Effect of Claims Allowance Order**

Tax Administration—Bankruptcy—Jurisdiction of Department of State Revenue

**Tax Administration—Extraordinary Corporate Transfers --
Assumptor/Successor Liability**

Authority: *Celotex Corp. v. Edwards*, 115 S.Ct. 1493 (U.S. 1995); *Limbach v. Hooven & Allison Co.*, 104 S.Ct. 1837 (U.S. 1984); *Katchen v. Landy*, 86 S.Ct. 467 (U.S. 1966); *Commissioner v. Sunnen*, 68 S.Ct. 715 (U.S. 1948); *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994); *Elmer v. Tenneco Resins, Inc.*, 698 F.Supp. 535 (D. Del. 1988); *Drug, Inc. v. Hunt*, 168 A. 87 (Del. 1933); 8 Del. Code § 271(a) (1983); *Carpenter v. Farm Credit Services of Mid-America, Inc.*, 654 N.E.2d 1125 (Ind. 1995); *Hoover v. Hearth & Home Design Center, Inc.*, 654 N.E.2d 744 (Ind. 1995)

The taxpayer asserts that the confirmed Chapter 11 Plan of Reorganization of its predecessor in interest, the Order confirming that Plan and a later Bankruptcy Court order ruling on the Department's proof of claim, discharge the bulk of the assessment.

II. **International Fuel Tax Agreement (“IFTA”)—Apportionment of Tax—Audited Jurisdictional Miles (1996)**

Tax Administration—Audit Procedure—Effect of Agreement for Projecting Audit Results (Form AD-10A)

Authority: IFTA arts. III.A and III.C. (Feb. 1993, rev. July 1996); IC §§ 6-8.1-3-14 and -5-1(b)

The taxpayer also argues that the field auditors erred in computing audited jurisdictional miles traveled, notwithstanding that the taxpayer signed an Agreement to project Audit Results (Form AD-10A) specifying the methodology that the auditors ultimately used.

III. **IFTA—Credits Against Tax—Disallowed Tax-Paid Fuel Credit (1996)**

Authority: IFTA arts. VII.B., VII.C., VIII.A, VIII.B., XVII.A and XVII.G (Feb. 1993, rev. July 1996); IFTA Procedures Manual arts. II.A. and II.B., (Feb. 1993); IC §§ 6-8.1-3-14 and 6-8.1-5-1 and -4(a) and (c)

Lastly, the taxpayer asserts that the field auditors erred in computing the amount of tax-paid fuel for which they disallowed the taxpayer credit.

STATEMENT OF FACTS

The taxpayer prosecuting this protest is, and the predecessor in interest that incurred the bulk of the taxes in issue was, a foreign corporation, each having incorporated in Delaware but maintaining its principal place of business in Indiana and doing business as a common motor carrier. The current taxpayer holds, and its predecessor held, a license under the International Fuel Tax Agreement (Feb. 1993, rev. July 1996) (hereafter “IFTA”), and for that reason the Department will refer to them interchangeably in this Letter as “taxpayers” or “licensees.” Each licensee made Indiana its “base jurisdiction” as IFTA art. II.B. defines that term.

On December 4, 1995, petitions for relief under Title 11 U.S. Code Chapter 11 (1994) (hereafter “the Bankruptcy Code” and “Chapter 11,” respectively) were filed in the United States Bankruptcy Court for the District of Delaware (hereafter “the bankruptcy court”) concerning the former licensee and four other affiliated corporations. The former taxpayer had incurred IFTA tax liability before, and incurred additional IFTA tax liability after, the date the Chapter 11 petitions were filed. The Department will refer below to these liabilities as being “pre-petition” and “post-petition,” respectively. For procedural efficiency the bankruptcy court consolidated these five cases (hereafter “the Chapter 11 cases”) into one case. As the Department will explain below, the current licensee succeeded the former taxpayer as a result of the Chapter 11 cases.

The bankruptcy court entered an “Order Confirming Fourth Amended Joint Plan of Reorganization Proposed By [the Affiliated Debtors-In-Possession] Under Chapter 11 of the Bankruptcy Code” on November 22, 1996. The Department shall refer to these two documents hereafter as “the confirmation order” and “the fourth amended plan” or “the confirmed plan,” respectively. The fourth amended plan and confirmation order each contain provisions discharging the debtors and the property of their respective estates from any liability for pre-confirmation claims and equity interests. In addition, except for claims or liabilities for which the confirmed plan provides otherwise, both documents also discharge the current licensee, among others, from any claims or liabilities that arose before the effective date of the plan (discussed below). Each document also enjoins creditors from collecting such claims or interests from any discharged or released persons; in addition, the confirmation order extends this protection to the respective assets of the debtors or the present taxpayer.

Under the fourth amended plan the debtors, including the former licensee, were to sell the bulk of their respective assets, including books, records, ledgers and fuel, pursuant to an Asset Purchase Agreement (hereafter “the purchase agreement”). The buyer was to be the present taxpayer, a new corporation formed to purchase those assets and identified both in the confirmed plan and the confirmation order as “the Successor Corporation.” The purchase price was to consist in part of claims meeting qualifications set out below for which the current licensee was to assume payment. The plan stated that it was to take effect on the date on or before which all the events specified as being preconditions were to occur, to have occurred or to have been waived, defined as “the Effective Date.” These events included execution of the purchase agreement and the closing of the sale forming the subject of that agreement. After the closing, the debtors were to cease business operations and liquidate their remaining assets. The effective date occurred and the confirmed plan took effect on December 18, 1996. The current taxpayer thereafter began using, and the former licensee discontinued the use of, the latter’s corporate name.

The purchase agreement provided that it was to be interpreted under Delaware law, but it also incorporated the provisions of the confirmation order and the confirmed plan. In particular it used the confirmed plan’s definitions for all words and terms that were not defined in the purchase agreement itself. The following definitions in the confirmed plan become relevant here:

ARTICLE I

DEFINITIONS

Unless otherwise provided in this Plan, all capitalized terms used herein shall have the meanings assigned to such terms in the Bankruptcy Code. For the purposes of this Plan, the following terms shall have the meanings set forth below.

1.1 “Administrative Claim” means any Claim arising on or after the Filing Date under Sections 503(b), 507(a)(1), [and other provisions] of the Bankruptcy Code [not relevant here], including, without any limitation, (a) any actual and necessary costs and expenses of preserving the estates of the Debtors and operating the business of the Debtors,

...

1.3 “Allowed Administrative Claim” means any Administrative Claim which is an Allowed Claim; provided, however, that each holder of an Administrative Claim which (a) arises prior to the Effective Date, but (b) does not [meet certain criteria inapplicable to this protest], must file a request for payment on or before the date that is thirty days after the Confirmation Date or such other limitation fixed by the Bankruptcy Court in order to be considered as an Allowed Administrative Claim.

...

1.5 “Allowed Claim” means [in relevant part] any Claim, the proof of which has been timely filed,

...

1.27 “Claim” means a claim against one or more of the Debtors within the meaning of Section 101(5) of the Bankruptcy Code.

...

1.42 “Disputed Claim” means, ... (b) any Claim as to which a proof of claim was required to be filed by an order of the Court but as to which a proof of Claim was not timely or properly filed.

...

One term that the purchase agreement did define was “Assumed Liabilities,” which included Allowed Administrative Claims as defined above. The purchase agreement also stated that “[b]uyer will not assume or have any responsibility, however, with respect to any other obligation or Liability of Sellers not included within the definition of Assumed Liabilities.” As mentioned above, the Assumed Liabilities were part of the current licensee’s purchase price for the bulk of the respective assets of the debtors.

The confirmed plan contained provisions requiring any creditor with an administrative claim to file a proof of or request for payment of that claim within thirty days of the confirmation date, *i.e.* by December 22, 1996 (hereafter “the administrative claims bar date”), with certain inapplicable exceptions. If a proof of claim was not timely filed, then

the fourth amended plan treated it as a “disputed claim” as defined above. A creditor holding a disputed administrative claim was not entitled to receive any distribution under the fourth amended plan unless the claim later became allowed.

The Department timely filed an Amended Administrative Proof of Claim for the post-petition part of the former taxpayer’s IFTA liability for the fourth quarter of 1995, plus accrued interest and penalty. The former licensee had failed to tender payment with its IFTA Quarterly Tax Report (Form IFTA-101) for that period. That omission forced the Department to estimate the former taxpayer’s liability for that quarter based on the liability reported on that return and its past reporting history and make a *pro rata* apportionment of some of that liability to the post-petition part of that period. The current licensee did not and does not dispute the timeliness of this claim but, as the Department will discuss below, it did dispute the claim as to amount.

Independent of its filing of the Amended Administrative Proof of Claim, the Department began the field audit of the post-petition IFTA liability that forms the subject of the present protest. (The former licensee’s pre-petition IFTA liability was the subject of a separate audit not in issue here.) The audit began on December 2, 1996, ten days after the bankruptcy court entered the confirmation order and twenty days before the administrative claims bar date. The post-petition audit was still in progress on the administrative claims bar date. As a result, the Department was unable to timely file a proof of claim for the part of that liability incurred in 1996.

On or about March 27, 1997, the last day of fieldwork on the audit, the current taxpayer, which by then had assumed control of the bulk of the former licensee’s assets, and the Department’s field auditors executed an Agreement to Project Audit Results (Form AD-10A) (hereafter the “audit projection agreement”). That language of the audit projection agreement describing the methodology to be used stated that miles and gallons would be audited in sample quarters. Audited miles and gallons within the sample quarters were to be divided by the reported amounts on the IFTA-101 returns for the sample quarters to determine error factors which were to be projected to the other quarters in the audit period. Events determined to be isolated and/or immaterial were only to be used to adjust reported amounts within the sample periods.

Although the current licensee was a new corporation, it kept many of the former taxpayer’s officers, and in particular those employees who had borne responsibility for filing the former licensee’s IFTA-101 returns and keeping the records supporting them. There is no evidence that any of the employees having such duties advised the field auditors before signing the audit projection agreement of any change in fleet composition or operations during the post-petition period that would have made the above-quoted methodology inappropriate.

The auditors applied the methodology of the audit projection agreement to the adjustment to audited jurisdictional miles by taking reported jurisdictional miles and adding audited additional jurisdictional miles. Audited additional jurisdictional miles were determined from the difference between audited and reported total miles for the sample vehicles.

These additional miles were allocated to each jurisdiction based on a percentage of travel on a per vehicle basis. The percentage of travel was computed by dividing reported miles for each jurisdiction by reported total miles. Audited jurisdictional miles were then divided by the reported jurisdictional miles for each respective jurisdiction and year in order to calculate error factors. The error factors calculated in the second quarter of 1996 (the sample quarter for that year) were then applied to the reported jurisdictional miles figures for all quarters in that year.

The auditors applied the methodology of the audit projection agreement to the adjustment to audited jurisdictional tax-paid gallons by examining audited jurisdictional tax paid gallons in the second quarter of 1996. This was the only quarter with complete records. Audited jurisdictional tax-paid gallons were calculated by taking adjusted jurisdictional tax-paid gallons and adding/subtracting any isolated errors discovered in the examination of the sample vehicles. Adjusted jurisdictional tax paid gallons were calculated by multiplying reported jurisdictional tax-paid gallons by the audited total tax paid gallons error factor. The audited total tax-paid gallons error factor was calculated by dividing adjusted total gallons by reported total gallons for the test quarter. Adjusted total gallons were determined by totaling the reported gallons from the third party billing system summaries and all on road "Cash" receipts in the sample quarter. This error factor was applied to all quarters and jurisdictions.

The Department on or about May 16, 1997 issued a Notice of Proposed Assessment based on the field audit covering the post-petition period through and including December 31, 1996. As already noted, it did not complete the audit and issue the assessment in time to file any proof of claim with the bankruptcy court to recover the 1996 part of that assessment under the confirmed plan. The current taxpayer, by its bankruptcy counsel, which is not its representative in this protest, moved the bankruptcy court to disallow, reduce or reclassify various creditors' claims. The claims forming the subject of this motion included the Department's previously filed Amended Administrative proof of Claim for the post-petition part of December, 1995. On or about February 24, 1998, while this protest was pending, the bankruptcy court conducted a hearing and entered an order on the motion as it affected the Department's claim (hereafter "the claim order"). The bankruptcy court reduced that claim, holding that the liability should have been calculated based on the actual mileage that the former taxpayer had accrued during the period that the claim covered. Lastly, the bankruptcy court ruled that the Department "is forever barred from asserting against the Successor Corporation any liability relating to (i) the portion of the Claim disallowed hereunder and (ii) any other post-petition claim for motor fuel taxes, interest or penalties which amounts are not evidenced by the amount of the Claim allowed hereunder."

I. **Tax Administration—Bankruptcy—Effect of Claims Allowance Order**

Tax Administration—Bankruptcy—Jurisdiction of Department of State Revenue

Tax Administration—Extraordinary Corporate Transfers -- Assumptor/Successor Liability

DISCUSSION

A. THE TAXPAYER’S ARGUMENT

The current licensee originally argued that the confirmation order discharged its liability for the bulk of the audited assessment. It based this conclusion on the fact that the Department did not file a proof of claim for the 1996 part of that liability. After the bankruptcy court issued the claim order, the current taxpayer cited the above-quoted bar language in that order in additional support of its discharge argument. The current licensee concedes its liability under the audit only for the post-petition part of December, 1995 in the reduced amount decreed in the claim order, and for the part of the post-confirmation period from and including December 18, 1996 (*i.e.*, the effective date) to and including December 31, 1996.

B. APPLICABLE BANKRUPTCY LAW

However, the present taxpayer’s legal argument on this subject in its brief was relatively sparse, which forced the Department to conduct extensive legal research. The bodies of law that the Department reviewed included the *res judicata* effect of bankruptcy court judgments on later proceedings between the same creditor and debtor, and of tax judgments on later proceedings between the same taxing authority and taxpayer. The Department summarizes that research as follows:

In *Katchen v. Landy*, 86 S.Ct. 467, 475 (U.S. 1966), the Supreme Court said that if a bankruptcy court rules adversely on a creditor’s proof of claim, that creditor cannot relitigate its claim in a second suit. However, the Court has also said in *Commissioner v. Sunnen*, 68 S.Ct. 715 (U.S. 1948), that “if a claim of liability or non-liability relating to a particular tax [period] is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding *involving the same claim and the same tax [period]*.” *Id.* at 719-20 (emphasis added). (The Court extended *Sunnen* to judgments for state taxes (such as the present assessment) in *Limbach v. Hooven & Allison Co.*, 104 S.Ct. 1837 (U.S. 1984)). Thus, a bankruptcy court’s judgment on a proof of claim for a tax liability can only be *res judicata* and bind the creditor taxing authority only as to the period or periods and tax type or types that the proof of claim covers.

C. THE CLAIM ORDER IS *RES JUDICATA* AS TO
THE POST-PETITION PART OF DECEMBER, 1995.

As mentioned in the Statement of Facts, the Department filed the Amended Administrative Proof of Claim only for motor fuel taxes incurred under IFTA during the post-petition part of December, 1995. In light of the foregoing research, the Department concludes that, as a matter both of bankruptcy and of tax law, the claim order binds it, as to both the former and current taxpayers, only as to that tax and that period. Payment of that claim will satisfy the part of the assessment for that claim or period, and will moot the issue of whether the bankruptcy proceedings discharged the assessment to that extent.

D. THE DEPARTMENT LACKS SUBJECT MATTER JURISDICTION AND
ADMINISTRATIVE AUTHORITY TO CONSIDER THE DISCHARGE
ARGUMENT AS APPLIED TO THE REST OF THE ASSESSMENT.

However, the limited scope of the Amended Administrative Proof of Claim does not mean that the Department is free to rule on the effect of the bankruptcy proceedings on the part of the assessment covering the rest of the post-petition period. The Department is acting in this protest not as a federal bankruptcy court, but as a state administrative adjudicator. As such, it lacks the subject matter jurisdiction and the administrative authority to entertain the current taxpayer's discharge argument as applied to the part of the post-petition assessment incurred in 1996 before the December 18, 1996 effective date of the confirmed plan. A bankruptcy court is the only court with initial jurisdiction to interpret its orders. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1498-1501 (U.S. 1995).

The Department therefore declines to construe the Bankruptcy Code, the plan, the confirmation order or the bar language in the claim order, or to pass on the merits of the current taxpayer's discharge argument, as they may affect either licensee's IFTA liability for the pre-effective date part of 1996. This ruling does not mean, however, that the Department will refuse to entertain any future protest by a party to a bankruptcy of a tax liability that is not, and does not become, a subject of adjudication in the bankruptcy proceeding. The general rule in Indiana is that for state law purposes, the debtor's merely filing bankruptcy is not itself an election of a remedy that is inconsistent with any state law remedy the debtor may have. *Hoover v. Hearth & Home Design Center, Inc.*, 654 N.E.2d 744, 745 (Ind. 1995). Neither is a debtor's exercise of a state law remedy made moot by later filing bankruptcy, nor is the debtor's exercise of its state law remedy automatically stayed. *Carpenter v. Farm Credit Services of Mid-America, Inc.*, 654 N.E.2d 1125, 1127-28 (Ind. 1995).

E. THE PRESENT TAXPAYER DID NOT ASSUME LIABILITY FOR THE PART
OF THE ASSESSMENT INCURRED BEFORE THE PLAN'S EFFECTIVE DATE.

Even though the Department does not have bankruptcy subject matter jurisdiction, it does have jurisdiction to rule on the part of the post-petition assessment incurred in 1996 on an independent legal basis, *i.e.* assumpor/successor liability under Delaware corporate law.

As noted in the Statement of Facts, the purchase agreement states that Delaware law governs its interpretation, and both parties to the agreement were incorporated in Delaware. Generally, the courts have interpreted Delaware's corporation law as not holding a company that is a transferee of all or substantially all of another corporation's assets liable for the transferor company's debts unless the transaction amounts to a merger or consolidation. *E.g.*, *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1272-73 (5th Cir. 1994); *Drug, Inc. v. Hunt*, 168 A. 87, 96 (Del. 1933). (Indiana corporate law is in accord on this point. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1233 (Ind.1994)). Title 8 Del. Code § 271(a) (1983) specifies the procedure for the sale, lease or exchange of all or substantially all of a corporation's assets. "Even if all or substantially all of the assets are sold pursuant to section 271, the transferee normally incurs no liability to the transferor's creditors so long as the statutory procedure is observed." III E. FOLK, R. WARD & E. WELCH, FOLK ON THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS § 271.9, at page 271:36 (3rd ed. Supp. 1998-1).

There are exceptions to this rule, but none of them apply to the present situation. The one that comes closest is the "continuation theory," under which the court treats the transferee corporation as being a continuation of the transferor company. (Indiana corporate law recognizes this theory. *Winkler, supra*, 638 N.E.2d at 1233.) Delaware courts have narrowly construed this exception. *E.g.*, *Elmer v. Tenneco Resins, Inc.*, 698 F.Supp. 535, 541-42 and cases there cited (D. Del. 1988). So long as the parties to the transfer are separate legal entities, the exception does not apply, even if the transferee corporation was organized for the specific purpose of acquiring the transferor company's assets. *Id.* That is the present situation. In addition, the purchase agreement states that the present taxpayer as "[b]uyer will not assume or have any responsibility, . . . , with respect to any other obligation or Liability of Sellers not included within the definition of Assumed Liabilities." *Id.* The agreement's definition of the latter term includes allowed administrative claims, *i.e.* administrative expenses (including taxes) for which a proof of claim was timely filed and allowed. The Department did not file an administrative proof of claim for the 1996 part of the post-petition assessment. Thus, the Department cannot hold the present taxpayer liable for that part of the assessment as a matter of Delaware corporate law if the debtors observed the statutory procedure when they sold substantially all of their assets to the present taxpayer. The Department has no information as of this writing indicating that the statutory procedure was not observed.

The current licensee therefore is not liable for the part of the post-petition assessment incurred beginning on January 1, 1996 and ending on December 17, 1996. It became liable for the incurring of motor fuel taxes beginning on the next day, December 18, 1996, the day of the execution of the purchase agreement and the closing of the sale. The Department accordingly will confine its discussion of the next two issues to the period of December 18—31, 1996.

FINDING

The taxpayers' protest as to this issue is sustained on grounds other than those the taxpayers argued. The protest is sustained as to the post-petition part of December, 1995 on grounds that the claims order is *res judicata* as to that period. The protest is also sustained as against the current taxpayer as to the part of the assessment incurred in calendar 1996 before December 18, 1996 because the present licensee did not assume that liability as part of its purchase of the bulk of the former taxpayer's assets.

II. **International Fuel Tax Agreement ("IFTA")—Apportionment of Tax—Audited Jurisdictional Miles (1996)**

Tax Administration—Audit Procedure—Effect of Agreement for Projecting Audit Results (Form AD-10A)

DISCUSSION

The present licensee argues that the Department should have used a "blended" mileage error factor for calendar 1996 to compute miles traveled in IFTA member jurisdictions, due to a change in the composition of the former taxpayer's fleet in the second quarter of that year. In that quarter, the current taxpayer represents that the prior licensee phased out what is described as its "shorthaul" subfleet, which it had been using for intra-city operations, as distinguished from its "longhaul" subfleet engaged in inter-city operations. The present taxpayer contends that the shorthaul subfleet had a significantly higher jurisdictional miles error factor than that of the longhaul subfleet. The current licensee contends that the reasons for the differences between these error factors were that the same driver did not consistently operate and report on each sampled shorthaul vehicle, and that there were technological limitations in the former taxpayer's reporting system as used in intra-city operations. The present taxpayer contends that the Department's applying a jurisdictional miles error factor to all of 1996 that was calculated from a vehicle sample that included shorthaul vehicles resulted in an overstatement of audited jurisdictional miles, and by extension tax liability, for that year.

However, as noted in the Statement of Facts, none of the current licensee's tax compliance personnel, many of whom had reported for the former taxpayer, pointed out to the field auditors the claimed change in the latter's fleet composition. The tax compliance employees should have had some idea by the last day of fieldwork which vehicles the auditors were sampling. The audit began while the prior licensee was still the debtor-in-possession and ended after the current taxpayer had come into existence and begun common motor carrier operations. The employees' silence on this matter therefore is imputable to both licensees and ratifies the auditors' use of the shorthaul sample vehicles in arriving at the jurisdictional miles error factor for 1996.

In addition, as the Statement of Facts also describes, the current taxpayer executed an audit projection agreement on the last day of fieldwork. The present licensee's signing of that agreement was a representation by it to the Department on which it was entitled to

rely in preparing the audit summary and issuing the notice of proposed assessment. The current taxpayer is therefore administratively estopped from now challenging the Department's inclusion of the shorthaul vehicles in the sample from which it calculated the jurisdictional miles error factor.

FINDING

The current taxpayer's protest is denied as to this issue as applied to the period beginning December 18, 1996 and ending December 31, 1996.

III. IFTA—Credits Against Tax—Disallowed Tax-Paid Fuel Credit (1996)

The current licensee argues that the Department should have calculated and used a separate error factor for each jurisdiction in disallowing any credit for tax-paid fuel, rather than using a single error factor for all jurisdictions.

IC § 6-8.1-5-4(a) and (c) require persons subject to a listed tax to keep books and records for the Department or its agents to inspect and review at all reasonable times, to enable the Department to determine the person's liability for that tax. IFTA arts. VII.B., VII.C., VIII.A and VIII.B. as authorized by IC § 6-8.1-3-14, and IFTA Procedures Manual arts. II.A. and II.B. (Feb. 1993) as incorporated into IFTA by IFTA arts. XVII.A and XVII.G, require IFTA licensees to keep and maintain detailed receipts of tax-paid fuel purchases.

IC § 6-8.1-5-1(b) places the burden of proof on the taxpayer to prove that a notice of proposed assessment is wrong. Thus, if an audited IFTA licensee believes that the Department has incorrectly disallowed credit for tax-paid fuel, or has disallowed more credit than the facts support, IC § 6-8.1-5-1(b) requires the taxpayer to produce those tax-paid fuel receipts that it is required to keep that would justify its position. The present taxpayer has not done so in this protest, as it could not do since, as noted in the Statement of Facts, the second quarter of 1996 (the test quarter for that year) was the only quarter with complete records. The current licensee has thus failed to sustain its burden of proof under IC § 6-8.1-5-1(b) that the assessment is wrong or inconsistent with IFTA arts. III.A and III.C. as authorized by IC § 6-8.1-3-14.

FINDING

The current taxpayer's protest is denied as to this issue as applied to the period beginning December 18, 1996 and ending December 31, 1996.

A supplemental audit will be conducted, and a supplemental notice of proposed assessment issued, consistent with this letter of findings.